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No. 85-216

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1985

FRANK ROA, JR., YVONNE JEAN ROA, Individually And As Guardian Ad Litem For FRANK JOSEPH ROA,

Appellants,

vs.

LODI MEDICAL GROUP, INC., GORDON B. ROGET, M.D., LODI COMMUNITY HOSPITAL,

Appellees.

ON APPEAL FROM
THE SUPREME COURT OF CALIFORNIA

[redacted]

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LODI MEDICAL GROUP, INC., GORDON B. ROGET, M.D., LODI COMMUNITY HOSPITAL,

Appellees.

MOTION TO AFFIRM OR DISMISS

Amicus curiae California Hospital Association ("CHA") moves for summary affirmance of the judgment of the California Supreme Court rejecting appellants' contention that California Business and Professions Code section 6146 violates the First Amendment. Alternatively, CHA moves that this appeal be dismissed on the ground it does not present a substantial federal question.

This motion is brought by CHA because appellees Lodi Medical Group, Inc., et al., did not appear in the California appellate courts and undoubtedly will not appear in this court. CHA carried the laboring oar in responding to appellants' constitutional attack on California Business and Professions Code section 6146 in the California courts and, so far as we know, there is no one besides CHA to move to affirm or dismiss in this Court.

In the event this Court deems it inappropriate for CHA to move to affirm or dismiss because CHA is not a party, then we respectfully request that this document be considered an amicus curiae brief in support of affirmance or dismissal on the Court's own motion.

Appellants have consented to CHA's participation as amicus curiae. The consent of appellees has not been requested since appellees have not appeared.

STATEMENT OF THE CASE

This is an appeal from a decision of the California Supreme Court rejecting appellants' contentions that California Business and Professions Code section 6146 denies them due process and equal protection and violates their rights to freedom of speech and to petition the courts for redress of grievances. Appellants do not contend the California Supreme Court erroneously rejected their due process and equal protection claims; their appeal is limited to the questions of free speech and the right to petition.

Appellants' statement of the case adequately sets forth the relevant facts from the record. We take issue only with those portions of appellants' statement which, instead of stating facts, characterize section 6146 and the opinion of the California Supreme Court in argumentative terms. Our position on the statute and the California court's opinion is explained below.

SUMMARY OF ARGUMENT

During the mid-1970s California was in the throes of a health care crisis caused by skyrocketing medical malpractice insurance premiums. The State Legislature responded to the crisis by enacting a comprehensive package of statutes, including Business and Professions Code section 6146, designed to restrain the increase in premiums and keep California's health care system functioning.

Appellants' constitutional attack on section 6146 is premised on the notion that the statute, which limits attorneys' contingent fees in medical malpractice cases, somehow "deprives" malpractice plaintiffs of legal representation. We will show the total absence of factual basis for this assertion. Without this essential factual underpinning, appellants' entire Jurisdictional Statement falls.

For good measure we will distinguish the cases appellants rely on and explain that this Court's recent decision in *Walters v. National Association of Radiation Survivors*, 53 L.W. 4947 (U.S., June 28, 1985), pulls the rug from under appellants' constitutional claims.

ARGUMENT

I.

CALIFORNIA BUSINESS AND PROFESSIONS CODE SECTION 6146 IS PART OF A COMPREHENSIVE PACKAGE OF STATUTES DESIGNED TO ALLEVIATE A CRISIS IN CALIFORNIA'S HEALTH CARE SYSTEM CAUSED BY SKYROCKETING MEDICAL MALPRACTICE INSURANCE PREMIUMS.

In May 1975 the Governor of California convened the Legislature in extraordinary session to consider measures aimed at remedying a crisis in health care. The nature of the crisis was described recently by the California Supreme Court in *American Bank & Trust Co. v. Community Hospital*, 36 Cal.3d 359, 371, 683 P.2d 670, 677-78, 204 Cal.Rptr. 671, 678-79 (1984):

> "The problem . . . arose when the insurance companies which issued virtually all of the medical malpractice insurance policies in California determined that the costs of affording such coverage were so high that they would no longer continue to provide such coverage as they had in the past. Some of the insurers withdrew from the medical malpractice field entirely, while others raised the premiums which they charged to doctors and hospitals to what were frequently referred to as 'skyrocketing' rates. As a consequence, many doctors decided either to stop providing medical care with respect to certain high risk procedures or treatment, to terminate their practice in this state altogether, or to 'go

> bare,' i.e., to practice without malpractice insurance. The result was that in parts of the state medical care was not fully available, and patients who were treated by uninsured doctors faced the prospect of obtaining only unenforceable judgments if they should suffer serious injury as a result of malpractice."

See *id.*, at 363 n.1, 683 P.2d, at 672 n.1, 204 Cal.Rptr., at 673 n.1 (quoting the Governor's executive proclamation calling the Legislature into extraordinary session).

The Legislature, "which thoroughly investigated this matter through numerous hearings, audits and the like," *id.*, at 372, 683 P.2d, at 678, 204 Cal.Rptr., at 679, expressly found and declared

> " 'that there is a major health care crisis in the State of California attributable to skyrocketing malpractice premium costs and resulting in a potential breakdown of the health delivery system, severe hardships for the medically indigent, a denial of access for the economically marginal, and depletion of physicians such as to substantially worsen the quality of health care available to citizens of this state.' " *Id.*, at 372 n.11, 683 P.2d, at 678 n.11, 204 Cal.Rptr., at 679 n.11.

The Legislature responded to the crisis by enacting the Medical Injury Compensation Reform Act of 1975 (MICRA),

> "a lengthy statute which attacked the problem on several fronts. In broad outline, the act (1) attempted to reduce the incidence and severity of medical malpractice injuries by strengthening governmental oversight of the education, licensing and discipline of physicians and health care providers, (2) sought to curtail unwarranted insurance premium increases by authorizing

> alternative insurance coverage programs and by establishing new procedures to review substantial rate increases, and (3) attempted to reduce the cost and increase the efficiency of medical malpractice litigation by revising a number of legal rules applicable to such litigation." *American Bank & Trust*, 36 Cal.3d, at 363-64, 683 P.2d, at 672, 204 Cal.Rptr., at 673.

MICRA provisions "made changes in existing tort rules in an attempt to reduce the cost of medical malpractice litigation, and thereby restrain the increase in medical malpractice insurance premiums." *Fein v. Permanente Medical Group*, 38 Cal.3d 137, 159, 695 P.2d 665, 680, 211 Cal.Rptr. 368, 383 (1985). Specifically, these changes are designed to:

1. Permit the defendant to introduce evidence of collateral source recovery by the plaintiff and the plaintiff to introduce evidence of the amount paid or contributed to secure the right to such benefits. Cal. Civ. Code § 3333.1, subd. (a), upheld in *Fein*, 38 Cal.3d, at 164-67, 695 P.2d, at 784-86, 211 Cal.Rptr., at 387-90.

2. Eliminate the subrogation rights of a collateral source. Cal. Civ. Code § 3333.1, subd. (b), upheld in *Barme v. Wood*, 37 Cal.3d 174, 689 P.2d 446, 207 Cal.Rptr. 816 (1984).

3. Limit recovery of nonpecuniary loss to $250,000. Cal. Civ. Code § 3333.2, upheld in *Fein*, 38 Cal.3d, at 157-64, 695 P.2d, at 679-84, 211 Cal.Rptr., at 382-87.[1]

4. Require periodic payment of any award for future damages which equals or exceeds $50,000. Cal. Code Civ. Proc. § 667.7, upheld in *American Bank & Trust*.

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[1] A Jurisdictional Statement and Motion to Dismiss are currently pending consideration by this Court in *Fein*, No. 85-19.

5. Limit contingent fee payments to attorneys. Cal. Bus. & Prof. Code § 6146, upheld in *Roa v. Lodi Medical Group, Inc.*, 37 Cal.3d 920, 695 P.2d 164, 211 Cal. Rptr. 77 (1985).

6. Shorten the statute of limitations. Cal. Code Civ. Proc. § 340.5, upheld in *Kite v. Campbell*, 142 Cal.App.3d 793, 191 Cal.Rptr. 363 (1983).

7. Require 90 days' notice to the defendant before filing suit. Cal. Code Civ. Proc. §§ 364-65.

8. Permit arbitration agreements between doctors and patients. Cal. Code Civ. Proc. § 1295.

By these tort reforms and the other MICRA reforms in the areas of health care quality control and review of insurance premium increases[2]

> "the Legislature hoped (1) to restore insurance premiums to a level doctors and hospitals could afford, thereby inducing them to resume providing medical care to all segments of the community, and (2) to insure that insurance

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[2] Assemblyman Barry Keene, author of MICRA, explained:

> "A general policy (and . . . *political*) decision was made that all interested parties must sacrifice in order to reach a fair and rational solution to the insurance crisis. These included physicians, lawyers, insurance companies, and patients alike. [MICRA] was drafted to include all reforms in order to prevent any one interest group from sabotaging any single-objective bill."

Keene, "California's Medical Malpractice Crisis" in *A Legislator's Guide to the Medical Malpractice Issue* 27, 30 (1976, Health Policy Center, Georgetown University and The National Conference of State Legislatures), emphasis in original.

> "[B]y pitting the various concerned and powerful interest groups against one another, while preserving the delicate balance among them, we had a better chance of getting something out. This is called the 'equal bite' theory behind [MICRA]."

Id., at 33.

> would in fact be available as a protection for patients injured through medical malpractice." *American Bank & Trust*, 36 Cal.3d, at 372, 683 P.2d, at 678, 204 Cal.Rptr., at 679.

MICRA has had the desired impact. It created enough promise of stability to encourage doctors to form their own insurance carriers. By January 1982, 80 percent of the members of the California Medical Association were insured by physician-owned carriers or a cooperative trust, according to a CMA survey. California Medical Association, *Socioeconomic Report*, Vol. XXII, No. 5 (July/Aug. 1982), at 30. Only 6.1 percent of the CMA members surveyed were uninsured in 1982. *Ibid.*

The medical malpractice insurance problem, however, is not yet over; MICRA is as vital today as it was in 1975. In an analysis of California medical malpractice cases over $50,000 reported in the *Professional Liability Newsletter*, *Jury Verdicts Weekly*, and *Verdict Reports* during 1983, comparing previous reports of large losses from 1972 through 1983, Medical Underwriters of California, the corporate attorney-in-fact for the oldest physician-owned carrier in California, concluded:

> "More cases costing more money than ever before were reported in these publications during 1983. The medical, legal and insurance press have referred repeatedly to a renewed 'malpractice crisis' during the year. The impact of this new 'crisis' has not been felt as acutely in California as in Florida or New York, but the rapid rise in the number and average costs of large cases as shown in this report almost ensures that malpractice premium rate increases and restrictions in choices of coverage will occur." Medical Underwriters of California, *California Large Loss Trend Study — Malpractice 1983 Update*, at 1.

An American Medical Association task force recently reported:

> "A look at what has been happening with regard to numbers and costs of claims reveals that the professional liability problem is again extremely serious — and that actually, in some areas of the nation, from a financial impact standpoint, it is more serious than it was in the mid-'70s. [¶] The temporary respite that followed the mid-'70s upheaval is over." American Medical Association Special Task Force on Professional Liability and Insurance, *Professional Liability in the '80s*, Report 1 (Oct. 1984), at 10.

II.

BUSINESS AND PROFESSIONS CODE SECTION 6146 WORKS HAND-IN-HAND WITH THE OTHER TORT REFORMS TO ACHIEVE THE LEGISLATURE'S PURPOSE TO RESTRAIN THE INCREASE IN MEDICAL MALPRACTICE INSURANCE PREMIUMS.

Section 6146 prescribes the following sliding scale for attorneys' contingent fees in medical malpractice cases: (1) 40 percent of the first $50,000 recovered; (2) 33 and 1/3 percent of the next $50,000 recovered; (3) 25 percent of the next $100,000 recovered; and (4) 10 percent of any amount recovered in excess of $200,000. (The fee permitted by section 6146 for appellants' attorney in this case is $90,800, compared to $122,800 if section 6146 had not been enacted. *Roa*, 37 Cal.3d, at 924-25, 695 P.2d, at 165-66, 211 Cal.Rptr., at 79.)

The California Supreme Court explained in this case how section 6146 interacts with the other MICRA tort reforms

to ensure that the full burden of insurer savings does not fall on plaintiffs alone:

> "In order to reduce malpractice insurance costs, MICRA incorporated a number of provisions that place special limits on, or that at least may tend to reduce, a malpractice plaintiff's recovery, provisions that are not applicable to other personal injury plaintiffs. (See, e.g., Civ. Code, § 3333.2, subd. (b) [limiting recovery for noneconomic losses to $250,000]; 3333.1, subd. (a) [authorizing admission of evidence of 'collateral source benefits'].) The Legislature may reasonably have concluded that a limitation on contingency fees in this field was an 'appropriate means of protecting the already diminished compensation' of such plaintiffs from further reduction by high contingency fees." *Roa*, 37 Cal.3d, at 932, 695 P.2d, at 171, 211 Cal.Rptr., at 84.

The court also explained how section 6146 itself could contribute to reduced malpractice insurance costs:

> "A plaintiff is quite naturally concerned with what a proposed settlement will yield to him personally, and because section 6146 permits an attorney to take only a smaller bite of a settlement, a plaintiff will be more likely to agree to a lower settlement since he will obtain the same net recovery from the lower settlement." *Id.*, at 931, 695 P.2d, at 170, 211 Cal.Rptr., at 83.

For example, a plaintiff who needs $1 million cannot settle for less than $1,666,667 if the contingent fee is 40 percent, or $1,500,000 if the fee is 33-1/3 percent. Under section 6146 the case could be settled for a little less than $1,200,000. And to the extent more cases settle the amount insurers pay in legal fees to defense lawyers will go down, further favorably impacting insurance premiums.

The California Supreme Court also observed that

> "an unusually high percentage of medical malpractice cases that go to trial result in defense verdicts. While there may be many explanations for this phenomenon, the Legislature could rationally have believed that unregulated contingency fee contracts — calling for potentially huge attorney fee awards if cases are won — play at least some part in leading so may plaintiffs to pursue malpractice claims that ultimately prove unsuccessful." *Ibid.*

The court pointed out that section 6146 'reduc[es] plaintiffs' attorneys' incentive to encourage their clients to pursue marginal claims." *Ibid.*[3]

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[3] In their Jurisdictional Statement appellants attack the California Supreme Court's assessment of the role of section 6146 in achieving the legislative purpose to restrain the increase in insurance premiums. They claim "the legislative history of Section 6146 indicates that the California Assembly . . . did not seriously contend that limiting plaintiffs' attorneys' fees would do anything to alleviate the 'crisis' in malpractice insurance." Jurisdictional Statement, at 23. Appellants' citations to the legislative record, *id.*, at 23 n.27, ostensibly in support of their assertion, in fact lend no support whatsoever. At the pages cited in the transcript of the February 18, 1975 hearing of the Assembly Select Committee on Medical Malpractice (87-89, 104-05), witness Arne Werchik, *an attorney specializing in medical malpractice litigation on behalf of plaintiffs*, Hearing Transcript, at 76, not a legislator, testified that contingent fees do not affect the size of jury verdicts or settlements and reducing such fees would have no effect on doctors' insurance costs. Assemblyman Brman replied, "Possibly that's so." *Id.*, at 105. As for the February 21, 1975 hearing, at the pages cited (80-87), Assemblyman Berman asked witness Kay Eberhard, vice-president of an insurance company, Hearing Transcript, at 67, how limiting contingent fees would address the problem of insurance availability. Mr. Eberhard explained that his proposal included disclosure of the reduced fee to the jury. He believed juries do take the fee into consideration in arriving at their verdict, so disclosure of reduced fees would result in lower verdicts. Finally, at the page cited in the Report of the Auditor General (30), the statement is: "*Unless the amount of medical malpractice settlements continue to rise in the future* there will be little if any effect on medical

malpractice insurance rates as a result of limitations imposed on attorney contingency fees." Emphasis added. It is undeniable that settlement amounts *did* continue to rise. The average amount of indemnity per claim over $50,000 in California rose from $403,279 in 1975 to $790,028 in 1983. The number of awards and settlements exceeding $1 million increased from 4 in 1975 to 19 in 1983. Medical Underwriters of California, *supra*, at 6. In sum, there is nothing in these citations to the legislative record to support appellants' claim that the Assembly "did not seriously contend that limiting plaintiffs' attorneys fees would do anything to alleviate the 'crisis' in malpractice insurance."

Appellants also err in referring to what they claim is "the legislature's own conclusion that there was no significant evidence of . . . meritless litigation" which could be screened out by lower contingent fees. Jurisdictional Statement, at 24. They cite page 5 of the Preliminary Report of the Assembly Select Committee on Medical Malpractice, which was issued about one year before the Governor called the Legislature into extraordinary session to address the malpractice insurance crisis. The report only says: "[T]here is little evidence that a *large number* of non-meritorious medical malpractice nuisance suits have been filed. . . ." Emphasis added. Moreover, appellants inaccurately represent that "the legislature itself found a 95% rejection rate of claims prospective plaintiffs brought to a lawyer's attention." Jurisdictional Statement, at 24. Instead, the Preliminary Report stated *experienced* medical malpractice lawyers report they reject 95 percent of cases. It went on to say:

> "Thus is appears that if there is a nuisance suit problem, it is the result of cases brought by attorneys who have limited experience in handling malpractice cases. As an increasing number of trial lawyers are entering the malpractice field due to its lucrative potential and the threat of no-fault auto insurance, there may, indeed, be an increase in less meritorious cases." P.43.

Most significantly, appellants ignore the fact that the Preliminary Report recommended "that the contingency fee should be studied with a view, particularly in cases involving substantial verdicts or settlements, to adopting a sliding scale . . . ." P.12.

Finally, appellants brand as "a creation of the California Supreme Court's imagination," Jurisdictional Statement, at 25-26 n.32, the idea that the Legislature intended to protect the already diminished compensation of medical malpractice plaintiffs from further reduction by high contingency fees. They base this assessment on the Legislature's

In short, by enacting section 6146 and the other MICRA tort reforms,[4] the Legislature intended to achieve a significant favorable effect on insurance premium rates without seriously harming injured plaintiffs while still adequately compensating their attorneys. Toward these ends, the section 6146 fee scale encourages attorneys to take smaller cases and provides a fair return to the attorney instead of a windfall in large-recovery cases. In this case, it allowed appellants' attorney a substantial $90,800 fee based on a $500,000 recovery achieved by settlement without trial.

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supposed acceptance of the proposition that malpractice plaintiffs' attorneys must recoup relatively large fees in the one out of three trials they win in order to make up for the two-thirds they lose. *Id.*, at 25 and 25-26 n.32. The only thing appellants cite to support this claim of legislative acceptance is the Preliminary Report of the Select Committee, at 48, where it says:

> "Plaintiffs' lawyers claim, with some justification, that the high percentages are necessary to compensate them for cases which have been unsuccessful. [Footnote:] A survey conducted by the HEW Commission showed that when acounting for cases both won and lost, the compensation of the attorneys under the contingent fee arrangement did not markedly differ from the compensation of defense attorneys who operate under an hourly rate. *The committee has been told, however, that malpractice specialists in California are earning far more than the $63.00 an hour figure cited by the Commission.*" Emphasis added.

On the very next page of the report the Committee makes its recommendation that the contingent fee be studied with a view to adopting a sliding scale. P. 49.

[4] "Although we do not suggest that the Legislature felt that . . . any . . . single provision of MICRA . . . was essential to the survival of the medical malpractice insurance system, there is surely nothing in the due process clause which prevents a legislature from making a number of statutory changes which, in combination, provide the requisite benefit to justify the enactment." *Fein*, 38 Cal.3d, at 160-61 n.18, 695 P.2d, at 682 n.18, 211 Cal.Rptr., at 385 n.18.

III.

THE ESSENTIAL PREMISE UNDERLYING APPELLANTS' FIRST AMENDMENT CLAIMS — THAT SECTION 6146 'DEPRIVES' MEDICAL MALPRACTICE PLAINTIFFS OF LEGAL REPRESENTATION — IS WHOLLY WITHOUT FACTUAL BASIS.

Section 6146 limits contingent fees in medical malpractice cases according to a sliding scale. In this case, the allowable fee based on appellants' $500,000 recovery by settlement is $90,800. This is not the $122,800 that appellants' attorney would have received otherwise, but there is no denying that it is still a substantial fee.

Despite this reality, the Jurisdictional Statement reads as though section 6146 flatly prohibits rather than reasonably limits contingent fees in medical malpractice cases. As though mere repetition could make it true, appellants state numerous times in various ways that section 6146 *deprives* malpractice plaintiffs of legal representation: e.g., it "effectively denies injured plaintiffs access to counsel and a day in court," Jurisdictional Statement, at 3; "impairs the court access of non-affluent injured individuals by drastically restricting the contingency fees," *ibid.*; "directly forbids *clients* — prospective plaintiffs — from engaging and compensating counsel on mutually acceptable terms," *id.*, at 12, emphasis in original; "[b]y drastically restricting the percentage levels of contingency fees . . . effectively denies a large category of plaintiffs access to both legal counsel and the courts of law," *id.*, at 16; "directly and drastically impairs" the right to petition the courts, *ibid.*; "singles out plaintiffs of modest or meager means for the *de facto* denial of legal representation and legal redress," *id.*, at 18; "radically alters the prospects for obtaining legal representation," *ibid.*; "deters plaintiffs' lawyers from

taking or vigorously prosecuting complex malpractice claims," *id.*, at 20; has "preclusive effects," *id.*, at 21; results in plaintiffs "find[ing] themselves denied adequate representation and effectively precluded from winning the malpractice recovery they merit," *ibid.*; results in "denials of access and destructions of claims," *ibid.*; "chok[es] off access to legal representation," *id.*, at 24; "frustrates a claimant's access to court," *id.*, at 25; constitutes a "debilitating wholesale restriction[ ] on the only means of retaining counsel," *id.*, at 27.

No matter how often appellants repeat it, their claim that section 6146 deprives malpractice victims of legal counsel is *ipse dixit*, founded on nothing more than appellants' own opinion of the "inevitable impact of Section 6146," *id.*, at 19, see 21. Appellants offer no factual support whatsoever from the record (or even from outside the record) based on experience with the statute. The California Supreme Court pointed out this flaw in appellants' arguments:

> "To the extent that . . . [the] First Amendment contention rests on the proposition that the particular fees allowed by section 6146 are too low to permit the effective exercise of the right to bring a lawsuit, the argument parallels plaintiff's claim . . . that the statute denies his due process right to counsel by making it difficult or impossible to secure an attorney. As we explain, the record provides no factual basis to support such a claim." *Roa*, 37 Cal.3d, at 927 n.5, 695 P.2d, at 168 n.5, 211 Cal.Rptr., at 81 n.5.
>
> "Plaintiffs contend . . . the authorized fees are so low that in practice the statute will make it impossible for injured persons to retain an attorney to represent them. The adequacy of the fees permitted by the statute is in large measure an empirical matter, and plaintiffs have made no showing to support their factual claim. . . . Under

> the circumstances, we certainly cannot hold that the amount of the fees permitted renders the statute unconstitutional on its face." *Id.*, at 927-28, 695 P.2d, at 168, 211 Cal.Rptr., at 81.

Appellants' attempt to convince this Court that section 6146 marks the end of legal representation for victims of medical malpractice in California rings hollow. The limits imposed by section 6146 are fair and reasonable. For recoveries less that $140,000, plaintiffs' attorneys used to receiving a one-third fee are better off than before.[5] For larger recoveries, plaintiffs' attorneys receive a substantial fee. If, after experience with the fee limitation, it turns out that adjustments need to be made to ensure that attorneys are not deterred from bringing meritorious cases, the Legislature can make those adjustments. There is no constitutional impediment here.

IV.

APPELLANTS' ARGUMENT THAT MEDICAL MALPRACTICE PLAINTIFFS HAVE A FIRST AMENDMENT RIGHT TO DECIDE FOR THEMSELVES HOW MUCH TO COMPENSATE COUNSEL "WITHOUT MEDDLING BY EVEN A WELL-MEANING GOVERNMENT" IS UNSUPPORTABLE.

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[5] Less-seriously injured claimants have always had trouble finding counsel. See *Report of the Secretary's Commission on Medical Malpractice*, DHEW Pub. No. (OS) 73-88, at 33. The Legislature took this fact into consideration when it provided for the highest percentage fee (40 percent) for recoveries below $50,000 and exempted such recoveries from the limitation on noneconomic loss, Cal. Civ. Code § 3333.2, and the periodic payment of future damages, Cal.Code Civ. Proc. § 667.7.

No doubt aware of the serious obstacle posed by their lack of a factual showing of denial of legal representation, appellants also argue: "The determination of how much of one's resources to devote to protected advocacy is *itself* of First Amendment significance, regardless of whether one can prove by some extrinsic measure that a restraint on a client's freedom to compensate counsel will objectively 'impair' that advocacy." Jurisdictional Statement, at 15, 16, emphasis in original.

As the California Supreme Court pointed out, however, "Although the argument is creative, its logic clearly proves too much, for it would preclude a state from imposing *any* limitation on attorney fees, no matter how unconscionably high such fees might be . . . ." *Roa*, 37 Cal.3d, at 927 n.5, 695 P.2d, at 167 n.5, 211 Cal.Rptr., at 80 n.5, emphasis in original.

In *Calhoun v. Massie*, 253 U.S. 170 (1920), this Court rejected a constitutional challenge to a provision of federal law which limited contingent fees to 20 percent of the recovery. Appellants contend *Calhoun* is "dubious authority . . . because it did not address a First Amendment claim. . . ." Jurisdictional Statement, at 13. But *Calhoun* did address a due process claim. In *Walters v. National Association of Radiation Survivors*, 53 L.W. 4947, discussed *infra*, this Court concluded in the context of a statutory limit on attorneys' fees that "appellees' First Amendment arguments, at base, are really inseparable from their due process claims." *Id.*, at 4956. The thrust of both claims is denial of " 'meaningful access to the courts.' " *Ibid.*

Secretary of State of Maryland v. Joseph H. Munson Co., —U.S—, 104 S.Ct. 2839, 81 L.Ed.2d 786 (1984), and *Buckley v. Valeo*, 424 U.S. 1 (1976), which appellants rely on for the proposition that they have a First Amendment right to spend as much as they like on legal advocacy in a medical malpractice case, are readily distinguishable.

Munson involved a state statute prohibiting a charitable organization, in connection with any fundraising activity, from paying as expenses more than 25 percent of the amount raised. This Court held the statute violated the First Amendment even though it permitted an administrative waiver of the limitation where it would effectively prevent the charity from raising contributions because "[t]he statute does not help the charity whose solicitation costs are high because it chooses . . . to disseminate information as a part of its fundraising." __U.S., at __, 104 S.Ct., at 2850, 81 L.Ed.2d, at 800. There being no necessary connection between fraud and high solicitation and administrative costs, *id.*, at __, 104 S.Ct., at 2850, 81 L.Ed.2d, at 798-99, the state's interest in preventing fraud was "only peripherally promoted by the limitation and could be served by measures less intrusive than a direct prohibition on solicitation." *Id.*, at __, 104 S.Ct., at 2849, 81 L.Ed.2d, at 798. In short, the limitation was "insufficiently related to the governmental interests asserted in its support to justify its interference with protected speech." *Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 639 (1980).

In our case, there is no evidence section 6146 interferes with the exercise of First Amendment rights. Also, the Legislature's goal of alleviating a crisis in health care by restraining the increase in medical malpractice insurance premiums is of far greater significance than the state interest in *Munson*. See *Barsky v. Board of Regents*, 347 U.S. 442, 449 (1954) ("It is elemental that a state has broad power to establish and enforce standards of conduct within its borders relative to the health of everyone there. It is a vital part of a state's police power"). The connection between the MICRA tort reforms, including section 6146, and the legislative goal is far closer than in *Munson*. Finally, nothing suggests the important state interest in this case can readily be achieved by other means.

In *Buckley*, this Court held the governmental interest served by limiting expenditures by political candidates from their own personal funds, i.e., equalizing the relative financial resources of candidates competing for elective office, "is clearly not sufficient to justify the provision's infringement of fundamental First Amendment rights." 424 U.S., at 54. The ceiling on personal expenditures in *Buckley* clearly and directly limited political expression " 'at the core of our electoral process and of the First Amendment freedoms.' " *Id.*, at 39. " '[I]t can hardly be doubted that the constitutional guarantee has its fullest and most urgent application precisely to the conduct of campaigns for public office.' " *Id.* at 15. Moreover, "[a] restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached." *Id.*, at 19, footnote omitted. *Buckley* is a far cry from our case, which does not involve political expression and where there is no reason to believe section 6146 interferes with malpractice plaintiffs' ability to pursue their rights in the courts through retained counsel.

V.

THIS COURT'S RECENT DECISION IN *WALTERS V. NATIONAL ASSOCIATION OF RADIATION SURVIVORS* REFUTES APPELLANTS' CONSTITUTIONAL ATTACK ON SECTION 6146.

In *Walters*, 53 L.W. 4947, this Court held 38 U.S.C. § 3404(c), which limits attorneys who represent veterans seeking benefits for service-connected death or disability to a $10 fee, does not violate the veterans' First Amendment rights. First, this Court noted the cases

> "establish[ing] for individuals and organizations a right to ensure 'meaningful access to courts' for themselves or their members . . . involved the rights of unions and union members to retain or recommend counsel for proceedings where counsel were allowed to appear, and the First Amendment interest at stake was primarily the right to associate collectively for the common good. In contrast, here the asserted First Amendment interest is primarily the individual interest in best prosecuting a claim, and the limitation challenged applies across the board to individuals and organizations alike." 53 L.W., at 4955.

The same distinctions exist with regard to California Business and Professions Code section 6146.

Next, this Court labeled as "questionable" the proposition that Veterans Administration claimants, who are allowed to speak for themselves or have someone speak for them, "also have a First Amendment right to pay their surrogate speaker." 53 L.W., at 4956. "[S]uch a First Amendment interest would attach only in the absence of a 'meaningful' alternative," and under the VA claims process a claimant does have an opportunity to make a meaningful presentation. *Ibid.* In contrast to the statute at issue in *Walters*, section 6146 permits a fee sufficiently large to enable medical malpractice plaintiffs to retain competent counsel. (In this case, appellants were permitted to pay their attorney $90,800.) Thus, it is not even necessary to reach the question of a "meaningful alternative" to representation by counsel in order to sustain the statute.

Finally, in *Walters* this Court noted that significant government interests favor the limitation on "speech." Those interests were "Congress' principal goal of wanting the veteran to get the entirety of the award" and not "complicat[ing] a proceeding which Congress wished to

keep as simple as possible." 53 L.W., at 4953. We submit the government interest at stake in California — preservation of the State's health care delivery system — is of paramount significance.

In short, if the $10 attorney's fee permitted in *Walters* does not violate the First Amendment, then the substantial attorney's fee permissible under section 6146 — $90,800 in this case — certainly does not, either.

CONCLUSION

For the reasons stated, the judgment of the California Supreme Court should be summarily affirmed or, in the alternative, this appeal should be dismissed.

Dated: September 4, 1985.

Respectfully submitted,

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PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of the City and County of Los Angeles; I am over the age of eighteen years and not a party to the within action; my business address is: 3550 Wilshire Boulevard, Suite 916, Los Angeles, California. On this date, September 4, 1985, I served the within MOTION TO AFFIRM OR DISMISS in re: "Frank Roa, Jr., Yvonne Jean Roa vs. Lodi Medical Group, Inc., Gordon B. Roget, M.D., Lodi Community Hospital" in the Supreme Court of the United States, October Term, 1985, No. 85-216;

on the persons interested in said action by placing 3 true copies thereof enclosed in sealed envelopes with first class postage prepaid, in the United States post office mail box at Los Angeles, California, addressed as follows:

LAURENCE H. TRIBE, Griswold Hall 307, 1525 Massachusetts Ave., Cambridge, MA 02138;
ROBERT A. HARLEM, INC. & ASSOC., Suite 2410, 120 Montgomery St., San Francisco, CA 94104;
LAW OFFICES OF DAVID M. HARNEY, Suite 1200, 650 South Grand Ave., Los Angeles, CA 90017;

and 1 copy on each of the following:

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SAN JOAQUIN COUNTY CLERK, Superior Court of San Joaquin County, For: Hon. JAMES P. Darrah, Judge, Room 370, 222 East Weber Ave. Stockton, CA 95205;
CLERK, COURT OF APPEAL, Third Appellate District, Room 119, Library and Courts Bldg. Sacramento, CA 95814;
JAMES E. DONOHUE, ESQ., Suite 201, 716 Tenth St., Sacramento, CA 95814;

I certify (or declare) under penalty of perjury that the foregoing is true and correct.

Executed on September 4, 1985

at Los Angeles, California.

Verdie Kettland

PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of the City and County of Los Angeles; I am over the age of eighteen years and not a party to the within action; my business address is: 3550 Wilshire Boulevard, Suite 916, Los Angeles, California. On this date, September 4, 1985, I served the within MOTION TO AFFIRM OR DISMISS in re: "Frank Roa, Jr., Yvonne Jean Roa vs. Lodi Medical Group, Inc., Gordon B. Roget, M.D., Lodi Community Hospital" in the Supreme Court of the United States, October Term, 1985, No. 85-216;

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CLERK, CALIFORNIA SUPREME COURT, Room 213, 3580 Wilshire Blvd., Los Angeles, CA 90010;

All parties required to be served have been served.

I certify (or declare) under penalty of perjury that the foregoing is true and correct.
Executed on September 4, 1985
at Los Angeles, California.

Kathleen Kattenhorn